

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN AMES BROWN,

No. C-08-02348 JSW (DMR)

Plaintiff,

**ORDER DENYING DEFENDANT'S
REQUEST FOR PROTECTIVE ORDER
REGARDING USE OF FOUR
RECORDINGS**

v.

ANDREW B. STROUD,

Defendant.

I. INTRODUCTION

This is a declaratory relief and copyright infringement action regarding the works of the musical artist Nina Simone. The parties assert competing claims to particular Simone recordings. Steven Ames Brown (“Brown”) contends that he successfully represented Ms. Simone in two prior actions, and acquired a 40% interest in sound recordings that Ms. Simone recovered through those actions. Andrew B. Stroud was married to Ms. Simone, and also acted as her business manager. Stroud and Stroud Productions and Enterprises, Inc. (“Stroud”) claim rights to Simone recordings flowing from a 1972 marital settlement agreement with Ms. Simone. Stroud counterclaimed against Brown and the Estate of Nina Simone (“the Estate”), seeking, among other things, declaratory relief that Stroud is the exclusive owner of the disputed recordings. The Estate counterclaimed against Stroud, seeking rights in the recordings as well as the return of property alleged to belong to the Estate. Brown filed a reply counterclaim against Sony Music Entertainment (“Sony”) to obtain a

1 declaration that Sony and not Stroud owns various Simone recordings that are the subject of
2 Stroud's counterclaims. Sony is the successor to RCA, one of the companies with which Ms.
3 Simone had a recording contract.

4 In late April 2011, this Court ordered Stroud to produce authenticated copies of four Simone
5 recordings. Stroud now requests the entry of a protective order to prevent the distribution of the four
6 recordings to third parties for any non-litigation related purpose. Brown, the Estate, and Sony all
7 oppose entry of such an order. The parties filed a joint letter brief pursuant to this Court's standing
8 order setting forth their positions in this dispute. *See* Docket No. 292. Having considered the letter
9 brief, the Court finds that this matter is appropriate for determination without oral argument pursuant
10 to Civil Local Rule 7-1(b). The Court hereby DENIES Stroud's request for a protective order.

11 II. BACKGROUND

12 Following an April 29, 2011 discovery hearing, the Court ordered Stroud to produce
13 authenticated copies of four Nina Simone tracks entitled "Love Me or Leave Me," "Don't Explain,"
14 "This Year's Kisses," and "Strange Fruit," that are on deposit with the Copyright Office and are the
15 subject of Stroud's copyright registration N-4087. *See* Docket No. 286. Stroud contends that these
16 copies should only be produced pursuant to a protective order that limits their use to purposes
17 necessary for this litigation. Stroud argues that good cause exists for the issuance of the protective
18 order to "prevent any commercial exploitation of the recordings ... [given] that the heart of this
19 action is the parties' cross-claims of copyright infringement..." Docket 292 at 3.

20 Brown and the Estate argue that they, and not Stroud, have rights to the four recordings, and
21 that Stroud is an unlawful copyright holder. Since Stroud admits he is not currently distributing the
22 four recordings, they argue, Stroud has nothing to lose by seeking a protective order that limits their
23 use to this litigation. However, the protective order proposed by Stroud would place a significant
24 burden on Brown and the Estate. They contend that Nina Simone transferred ownership of the four
25 recordings to Mercury Records in exchange for royalty rights, and warranted to Mercury that it had
26 the exclusive and perpetual rights to exploit those performances. According to Brown and the
27 Estate, they succeeded to Ms. Simone's rights under that contract, and third party Universal Music
28 Group ("UMG") succeeded to Mercury's Rights. If the protective order limits use of the four

1 recordings solely to this litigation, Brown and the Estate argue that it will put them in jeopardy of a
 2 claim by UMG for breach of warranty regarding the exclusive rights to the recordings. Indeed,
 3 Stroud appears to acknowledge this, stating that “[w]ithdrawing recordings from the market prior to
 4 the Court’s ruling as to ownership rights would not seem feasible and would subject parties to
 5 various breaches of contract.” Docket 292 at 4.¹

6 Similarly, Sony asserts that it is the lawful holder of rights in works fixed by Ms. Simone
 7 while she was under contract with Sony’s predecessors-in-interest. Sony contends that at this time,
 8 it cannot conclusively determine the status of its rights in and usage of these four songs. However,
 9 Sony notes that the protective order is “potentially highly prejudicial to Sony . . . if it is lawfully
 10 exploiting those works, or portions of those works.” *Id.* at 8.

11 In short, Brown, the Estate and Sony all contend that Stroud seeks the protective order as a
 12 form of inappropriate back-door injunctive relief that would interfere with rights currently asserted
 13 in the marketplace.

14 III. LEGAL ANALYSIS

15 Federal Rule of Civil Procedure 26(c) governs the process for obtaining a protective order:

16 A party or any person from whom discovery is sought may move for a protective
 17 order in the court where the action is pending... The court may, for good cause, issue
 18 an order to protect a party or person from annoyance, embarrassment, oppression, or
 19 undue burden or expense, including one of more of the following:

20 ...
 21 (G) requiring that a trade secret or other confidential research, development, or
 22 commercial information not be revealed or be revealed only in a specified way²

23 ¹ Stroud claims that the four recordings at issue in this motion “are not currently on the
 24 market,” and that a protective order would “serve to protect the interests of all parties.” Docket No.
 25 292 at 4. Brown and the Estate vehemently disagree. According to Brown, “these Nina Simone
 performances are in the market and have been continuously marketed by UMG for decades.” *Id.* at
 5 (emphasis in original). Brown further asserts that the four recordings are subject to contractual
 warranties with UMG, and that a protective order would also interfere with Brown and the Estate’s
 vested rights under collective bargaining agreements regarding uses of the recordings. *Id.* The
 Estate claims that it has ownership in the masters in question or has exclusive agreements already in
 place with third parties. *Id.* at 8.

26 ² The Ninth Circuit has held that Rule 26(c) should not be read to limit the type of
 27 information that may be subject to a protective order. *Phillips ex rel. Estates of Byrd v. General*
 28 *Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002) (Rule 26(c) gives district courts broad
 latitude to grant protective orders to prevent disclosures of materials for many types of information,
 including, but not limited to, trade secrets or other confidential research, development or commercial
 information; trial courts have substantial latitude to fashion protective orders.).

“For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted.” *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-1211 (9th Cir. 2002); *see also Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.1992) (“broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test”); *Navarro v. Eskanos & Adler*, 2007 WL 902550, *2-3 (N.D. Cal. March 22, 2007) (same). If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary. *Phillips*, 307 F.2d at 1211.

Here, the specific prejudice or harm identified by Stroud is “prevent[ion of] any commercial exploitation of the recordings.” Docket No. 292 at 3. This does not constitute “good cause” in the context of this case. As noted above, the proposed protective order may interfere with ongoing and assertedly legal commercial exploitation of the four works by Stroud’s opposing parties. The court agrees with the opposing parties that, in this way, Stroud’s proposed order would carry some of the attributes of a preliminary injunction without Stroud having met the rigorous standards for obtaining such an order. If Stroud wishes to restrain usage of the four works by the opposing parties, he has the ability to move for an injunction pursuant to Federal Rule of Civil Procedure 65.

In sum, Stroud has failed to meet his burden of establishing good cause for the proposed protective order.

IV. CONCLUSION

For the foregoing reasons, Stroud’s request for a protective order is denied. Stroud is hereby ordered to produce the verified and authenticated copies of the four recordings forthwith.

IT IS SO ORDERED.

Dated: June 14, 2011

